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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-286

JOHN REESE,

Petitioner,

v.

JACOB G. KASSAB, Secretary of the Department of Transportation of Pennsylvania, and JULIUS A. TROMBETTA, Director of the Bureau of Traffic Safety of Pennsylvania.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Reasons for Granting the Writ	11
1. The record shows Appellant's due process rights were violated in the proceedings in the State Courts so that the Court below erred if they intended not to relieve Appellant from being required to submit to any administrative license hearing under the Pennsylvania Point System statute on the basis of his existing driver's record	11
(a) The Federal Court below decided an important state question in conflict with applicable state law	11
(b) If the Court did not intend to relieve Appellant from any Administrative Hearing under the circumstances of the case, the Court below overlooked or misapplied the Federal questions involved in a way in conflict with applicable decisions of your Honorable Court	13
2. The Courts below erred in denying Appellant's motions and in not relieving him from having to submit to the hearing proposed and held by Appellees on April 12, 1972. The Statutory Court has permanently enjoined Appellees from suspending Appellant's drivers license under the Pennsylvania Point System statute, "unless, after an administrative hearing is granted in accordance with the Opinion of this Court, it be shown that there is sufficient reason for said suspension"	14
(a) The Courts below either overlooked or misapplied binding decisions of this Court concerning the type of Hearing to be given Licensee before suspension of their license, and a decision of the Third Circuit, itself	14

PAGE

3. **Under the circumstances of the case, the Court of Appeals erred in ruling the denial of Appellant's Rule 62 (b) Motion was not a final order and therefore not appealable, and that the denial of the Rule 60 (b) Motion by a single Judge of a Three-Judge Statutory Court under the instant circumstances was not reviewable by it and in ruling the matter was moot because some Administrative Hearing had been given Appellant** 19

(a) **If the Honorable Court of Appeals meant the Court of Appeals didn't have jurisdiction because the full statutory court did not act on these Motions, that Court has rendered a decision in conflict with one of its own decisions and with the decision of another Court of Appeals on a similar matter** 22

Conclusions 24

Appendix A—Opinion and Order of the Court of Appeals (May 16, 1973) 1a

Appendix B—Order Denying Motion to Enlarge Time in which to file Petition for Rehearing (June 12, 1973) 3a

Appendix C—Order of District Judge Louis Rosenberg Denying Motion to Stay Proceedings under Rule 62 (b), and Motion under Rule 60 (b) (April 11, 1972) 4a

Appendix D—Opinion of Three-Judge Statutory Court (October 26, 1971) 6a

Appendix E—Concurring Opinion Judge Rosenberg (October 26, 1971) 16a

Appendix F—Court Order Amending Opinion of October 26, 1971 (November 4, 1971) 27a

Appendix G—Court Order Amending Concurring Opinion of October 26, 1971 (November 5, 1971) ... 28a

Appendix H—Pennsylvania Statute § 1028—1959, April 29, P. L. 58, § 1028; 1959, Aug. 4, P. L. 598, § 1 ..... 29a

Appendix I—Pennsylvania Statute § 619.1—1959, April 29, P. L. 58, § 619.1, added 1966, Jan. 24, P. L. (1965) 1497, § 2. Pa. Point System, 75 P. S. 619.1 .. 32a

Table of Authorities.

PAGE

Cases:

Bell v. Burson, 402 U. S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971) 14, 19
Commonwealth v. Norman Bernstein, 7 Comm. Ct. 594, 300 A2d 905 (1973) 12
Commonwealth v. Ross, 6 Pa. Commonwealth Ct. 414, 296 A. 2d 291 (1972) 12
Cromelin v. Markwater (C. A. 5th (1950) 181 F. 2d 948) 20
Goldberg v. Kelly (1970) 397 U. S. 254, 25 L. Ed. 2d 287 ..... 15, 19
Great Falls Gas Company v. Public Service Commission of Montana, 39 F2d 176 (1930) 22
Greenspahn v. J. E. Seagrams & Sons (C. A. 2d 1951, 186 F. 2d 616) 20
Hamilton v. Nakai, 453 F2d 152 (CA 9) (1972) 22
In Re: 1 1958 Plymouth Sedan v. Commonwealth of Pennsylvania, 380 U. S. 693, 14 L. Ed. 2d 170 1965 . 13, 14
Spencer v. Kugler, 454 F2d 839 (1972) 22
Stanley v. Illinois, 31 L. Ed. 2d 551 (1972) 17
Virnelson Case, 212 Pa. Superior 359, 243 A2d 464 (1968) 11

Statutes.

Hornbook Law 14

Pennsylvania Appellate Court Jurisdiction Act of 1970 (17 P. S. 211.101 *et seq.*) 12

Pennsylvania Motor Vehicle Code 13, 17
75 P. S. § 101, *et seq.* as amended 5
75 P. S. § 1028(a) 6, 7

Pennsylvania Point System Statute 2, 4, 5, 14, 18, 21
75 P. S. Statute 619.1 ..... 3, 12, 17
619.1 (b) 6, 8
620 ..... 11, 12

PAGE

28 U. S. C. § 1253 ..... 21, 22
28 U. S. C. § 1254 (1) (3) 2
28 U. S. C. § 1291 20
28 U. S. C. § 2281, *et seq.* 21
28 U. S. C. § 2842 (5) 21, 22

RULES.

F. R. C. P. 60 20
Rule 60 (b) 1, 2, 3, 4, 5, 6, 8, 9, 19, 20, 21, 23
Rule 62 (b) 1, 2, 3, 4, 6, 9, 19, 20, 21

CONSTITUTION.

14th Amendment 15

MISCELLANEOUS.

Moore's Federal Practice:
Vol. 6A, § 57.13 19
Vol. 7 23
Vol. 9, § 110.14 (1) 20
Vol. 9, § 110.14 (2) 20
Vol. 9, § 110.03 (3) 22

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Opinions Below

The Opinion of the Court of Appeals for the Third Circuit (Appendix A, pp. 1A, 2A, *infra*) dismissing Appellant's Appeal is reported at F 2d . The Order of Court dated June 12, 1973, denying Appellant's Motion to enlarge time in which to file Petition for Rehearing (Appendix B, pp. 3a, *infra*). The Order of Judge Rosenberg, one of the Three-Judge Statutory Court denying Plaintiff's Motion for Stay under Rule 62 (b) pending disposition under Rule 60 (b), and the Motion under 60 (b)

is in Appendix C, pp. 4a, 5a *infra*. The Opinion of two of the Three-Judge Statutory Court filed October 26, 1971 is reported at 334 F. Supp. 744 (1971), and is in Appendix D, pp. 6a-15a *infra*. The Concurring Opinion of Judge Rosenberg, the third member of said Three-Judge Statutory Court (Appendix E, pp. 16a-26a *infra*). Order dated November 4, 1971 amending the Three-Judge Court Opinion of October 26, 1971 (Appendix F, p. 27a *infra*). Court Order November 5, 1971 by Judge Rosenberg Amending Concurring Opinion of his of October 26, 1971 (Appendix G, p. 28a *infra*).

Jurisdiction

The Order and Opinion of the Court of Appeals was filed May 16, 1973, dismissing Appellant's Appeal from the denial of his Motions under Rule 62 (b) and 60 (b), by Judge Louis Rosenberg, of the Three-Judge Statutory Court. A letter of counsel to the Circuit Court of Appeals was treated as a Motion to enlarge the time within which to file a Petition for Rehearing and was denied by Order dated July 12, 1973 (Appendix B, p. 3a, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1) (3).

Questions Presented

1. When Appellant's due process rights were violated, whether the Court below erred, if they intended not to relieve Appellant from being required to submit to any Administrative License Hearing under the Pennsylvania Point System Statute on the basis of his existing driver's record.

2. When the Three-Judge Statutory Court granted a permanent injunction vs. Appellees from suspending Ap-

pellant's driver's license under the Pennsylvania Point System Statute, unless, after an Administrative Hearing is granted in accord with the Court's Opinion, it be shown there is sufficient reason for said suspension, whether the Courts below erred in denying Appellant's Motions under 62 (b) and 60 (b), and in not relieving him from having to submit under protest to the Hearing, proposed and held by Appellee.

3. Whether the Court of Appeals erred in ruling the denial of Appellant's Rule 62 (b) Motion was not a final Order and therefore not appealable and that the Denial of the Rule 60 (b) Motion, by a Single Judge of a Three-Judge Statutory Court under the instant circumstances was not reviewable by it, and in ruling the matter was moot, because some administrative hearing had been given Appellant.

Statement of the Case

Appellant, Plaintiff below, is an individual citizen of Pennsylvania, has held a Pennsylvania driver's license since he was age 16, now being age 35. Appellant has hauled milk since 1963 under written contract with a co-operative association, picking up milk from numerous farmers in several counties in Western Pennsylvania and part of West Virginia. His contract is his sole means of livelihood for himself, his wife and four minor children. Because of threat of suspension of his driver's license under the Pennsylvania "point system", in 75 Purdon's Statute 619.1, after exhausting his State remedies in Pennsylvania Courts, Plaintiff obtained a temporary restraining order from the Western District Court of Pennsylvania and filed his complaint asking for a preliminary injunction to be made permanent after hearing thereon, attacking the constitutionality of the point system statute and its application

to him. A Three-Judge Statutory Court was appointed and hearing and trial was held on September 1, 1971, before this Three-Judge Court. The Court handed down an Opinion and Order by Judge Weis and Judge Staley, and Judge Rosenberg, the other member of the Three-Judge Court filed a concurring Opinion (App. D & E pp. 6a-26a *infra*). The Court issued an Order dated October 26, 1971, in favor of Appellant and against the Defendants, the Secretary of the Department of Transportation of Pennsylvania and the Director of the Bureau of Traffic Safety of Pennsylvania, *permanently* enjoining them from suspending Plaintiff's operator's license under the Pennsylvania Point System Statute "unless after an Administrative Hearing is granted in accordance with the opinion of this Court, it be shown that there is sufficient reason for said suspension." Further, said Court, by its Order, retained jurisdiction until such time as Defendant's regulations, policies and procedures have exhibited full compliance with the Order and Opinion.

Subsequent to this Opinion and Order, on the request of the State, Defendant herein, an informal hearing was held with counsel for both parties present, with the Honorable Judge Joseph F. Weis, Jr., and Louis Rosenberg, in chambers with a Court reporter. This was after and in connection with Defendants' Motion under Rule 60 (b) to Amend the Court Order and Opinion which was filed November 12, 1971, which was dismissed.

When Defendants scheduled him for a Pennsylvania Departmental License Hearing, Appellant presented his Motion under Rule 62 (b) for a Court Order to stay the Administrative Hearing proposed by Defendants or any like proceeding to enforce and under the Judgment and Order entered in favor of Appellant by the Court, pending

disposition of Appellant's other Motion under Rule 60 (b). Because Judge Weis was tied up in a protracted trial and Judge Staley was out of town, these Motions were considered by the Honorable Louis Rosenberg, alone, who entered an Order denying them on April 11, 1972, the same day they were presented. It is from the denial of these Motions that Plaintiff appealed to the Third Circuit Court. Plaintiff submitted to a Departmental Hearing one day after the denial of these Motions under protest as he was threatened with the suspension of his license if he failed to appear.

The Motion under Rule 60 (b) sets forth Appellant's contentions which were argued (Joint App. pp. 80-113). Briefly, Appellant requested the Statutory Court to be relieved of having to submit to any Administrative Hearing because of the invalidity of a second alleged offense and conviction of his under the Pennsylvania Motor Vehicle Code, as a basis for the Pennsylvania Secretary of the Department of Transportation assessing points and basing a suspension thereon. Being invalid, Appellant would not have 11 points on his driver's record. Therefore, the Secretary could not suspend his license as he has no power to do so until a driver gets 11 points. Moreover, the Statutory Court held, if a driver does accumulate 11 points, the State must first give an Administrative Hearing *before* suspension. But there is no right in a driver or duty of the State to have a hearing until there are 11 points. There is no right to appeal from mere assessment of points (Jnt. App. 54-55). The decision by the Statutory Court changed the law of Pennsylvania. Theretofore under the Pennsylvania "Point System" when a driver accumulated 11 points for moving violations under the Pennsylvania Motor Vehicle Code, 75 Purdon's Statutes, § 101, *et seq.* as amended,

his license was suspended without first being given an administrative hearing and an opportunity to be heard.

Neither party to this case appealed from the Opinion and Court Order of October 26, 1971, so that it became a Final Judgment binding on the parties. Appellant's Motions under Rules 62 (b) and 60 (b) were presented and denied on April 11, 1972.

Also, this Motion was to relieve Appellant from having to submit to the type of Administrative Hearing proposed by Defendants, if Appellant had to undergo a hearing. Also, the Three-Judge Court had not formally approved Defendants' regulations, policies, and procedures concerning the proposed Departmental Hearing and due notice thereof was not given before Plaintiff had to submit to the Hearing actually given him. Last, the Hearing actually given Plaintiff shows on its face that it was not a proper hearing as required by the Statutory Court's own Order and Opinion and the law (Jnt. App. 225-252).

For the second alleged offense under the Pennsylvania Motor Vehicle Code, mentioned before, an information was made against the within Plaintiff for an alleged offense on June 5, 1968, which shows the licensee was charged with the offense that "he did unlawfully then and there disobey the directions of a traffic signal . . . by disregarding directions of a traffic signal . . .", an alleged violation of Section 1028, Subsection (a) of the Pennsylvania Motor Vehicle Code (75 P. S. 1028 (a)). (Jnt. App. pp. 4, 5, 10 and 28.) Under the Pennsylvania "Point System" Statute (75 P. S. 619.1 (b)), the Secretary is only authorized to assess points and suspend licenses for violations and *convictions specified therein*, which section states *inter alia*, "Section of Code . . . 1028(a) Driving through traffic light . . .5", as the number of points that the Secretary may assess. (App. II, pp. 29a-31a; App. I, pp. 32a, 36a.)

The point that Appellant emphasized in the proceedings in the Courts below is the fact that Appellant paid fine and costs on an information which was not for "Driving through traffic light," and was at wide variance with the conviction report sent to the Pennsylvania Department of Transportation and with the conviction the minor judiciary entered against him without any notice to him. Therefore, the Department could not constitutionally assess points against him and use these points in calculating whether or not he had 11 points. In short, because of this second proceeding being invalid, Plaintiff contended that the State could not assess him with 5 points for this second offense.

At the trial Judge Staley said that the information made against plaintiff for the second offense is broader than the return of the magistrate (Jnt. App. 153). Counsel for the State admitted this (Jnt. App. 153, 172). Judge Staley said the licensee did not have due notice because he wasn't charged with "driving through a traffic light." Judge Staley stated that licensee was never notified of "running a red light" (Jnt. App. 153, 154). Judge Staley pointed out when the licensee received the information he wasn't notified of this because of the wording of the Information. Judge Rosenberg at the trial stated that licensee was entitled under the law to receive proper notice of the charge (Jnt. App. 155). Also, Counsel for the State admitted there was nothing under the Pennsylvania Statute the driver could do to correct the return of the Magistrate (Jnt. App. 157, 158, 187). Also, on inquiry of the Court as to what the letter to licensee said concerning the alleged second offense, after the State acted upon the conviction report, Counsel for the State showed the Court the letter sent licensee. The notice merely stated that for violation of Section 1028 (75 P. S. 1028 (a)) he was being assessed

with 5 points. But, the notice did not state anything about "driving through traffic light" (Jnt. App. 156).

After the injunction order of the Court dated October 26, 1971, Defendants filed a Motion to Amend the Court's Order and Opinion under Rule 60 (b), and the Informal Hearing mentioned was held on November 17, 1971 (Jnt. App. 176-210).

In Defendant's Motion to Amend, was the request at the bottom of page two: "It is further requested that the clause on page 5 of the Opinion which reads: '. . . that the fine and costs were paid on an information at variance with that for which the minor judiciary entered a conviction as Plaintiff contends occurred in this case . . .' be deleted and the following clause be substituted therefore:

. . . that the conviction was not one of those enumerated in Section 619.1 (b) . . ." (Jnt. App. 74, 75) (App. D, p. 11a, *infra.*)

In discussing this request, at this conference Judge Weis stated to counsel for the Defendant, "I can't agree to remove that. I think that is an area where the man would have been denied due process" . . . (Jnt. App. 196, 197).

His Honor Judge Weis was referring to the fact that in the case at bar the Magistrate's return to the department stated that the licensee had been "convicted" of "driving through a red light," where as in fact he was not charged with this in the information. Further, Judge Rosenberg in this context in response to a question by counsel for defendant if the State would call plaintiff in for an Administrative Hearing said: "Now you are asking for an advisory opinion. I, for one, wouldn't want to answer that although I can tell you this as of now: The Reese suspension is invalid. It doesn't exist, because it couldn't exist. There

is no basis in law for it to exist. From now on what you do should be in accordance with the Opinion. Is that understood?" (Jnt. App. 207-208).

It was never mentioned by the Defendants in advance as to the format to the hearing, as to whether or not the testimony would be recorded and witnesses other than the licensee and his witnesses would be required to be present (Jnt. App. 100-104). By letter dated December 21, 1971, one of counsel for the Defendants, answered as to the Hearing. It would be an informal hearing before a Departmental examiner without the taking of a formal record by a stenographer; although a taped recording made, may be made for departmental use only. This letter further stated "the department may call such witnesses as it determines to be necessary, and similarly the Defendant may present any witnesses he wishes." (Jnt. App. p. 103).

Appellant after being given notice of a scheduled Pennsylvania Departmental Hearing for April 12, 1972, presented the Motion under Rule 62 (b) and Rule 60 (b), which Judge Rosenberg dismissed on April 11, 1972. Therefore, Plaintiff had to submit to the Departmental Hearing as there was no other Judge available, either of the three-Judge Statutory Court or of the Circuit Court of Appeals to whom Plaintiff could apply for a further stay pending an Appeal from dismissal of these Motions, as Appellant was threatened with suspension if he didn't appear. The Departmental Hearing testimony was taken by a competent reporter and a copy of which has been filed in the record (Jnt. App. 225-252) shows on its face that it was not a proper hearing as required by the Statutory Court's own Order and Opinion and the law of the land.

On inquiry of counsel, the examiner said: "Examiner Malarbi: All I do is take the testimony on this violation

right here. That's the point in this hearing right now. This violation occurred July 30, 1969. I just want all the testimony on this. That's all there is to it" (Jnt. App. 234, 235). Counsel for Plaintiff said: "Mr. Hahn: Well, I realize that you are the hearing examiner for the State, and as I say, I don't know if you are aware before of the history of the case, were you, sir: "Examiner Malarbi: No, I wasn't" (Jnt. App. 234). Further, counsel for Appellant said: "Mr. Hahn: May I ask you one last thing, Mr. Malarbi? Did the State give you any instructions, let's say, as to the type of hearing to conduct in cases like this, under the Point System?" (Jnt. App. 248, 249.) The examiner answered this: "Examiner Malarbi: No, Mr. Hahn. This is all. I am supposed to take the testimony of this violation right here" (Jnt. App. 248, 249). Mr. Hahn asked again, Mr. Hahn: "That's all you were instructed?" Examiner answered "Examiner Malarbi: Yes, and this goes back to Harrisburg and they'll go over the testimony . . ." (Jnt. App. 249). He refused to hear evidence about the July 5, 1968 alleged offense about which the Court had commented so much.

In the stipulation of trial counsel filed for the trial on September 1, 1971, it was admitted in § 10 thereof, "No certified copies of the records of the alleged summary convictions of the Plaintiff and the Secretary's records showing the computation of the points or any other exhibits or records were made part of the record of the case in the State Courts" (Jnt. App. 40-41).

In the affidavit of Plaintiff's counsel, just before the trial, it was sworn to by him that when his client and he appeared at the Rehearing of this case before the Common Pleas Court of Washington County, Pennsylvania, on April 3, 1970, no testimony or any exhibits or records were

offered by the State nor was there any testimony whatsoever given at said hearing (Jnt. App. 36). Under Reasons, Appellant will point out how this procedure was contrary to the law of Pennsylvania in itself, and was one of the bases for Plaintiff's applying to the Federal Courts for relief (Jnt. App. 5).

After the Court of Appeals dismissed Appellant's Appeal, the Pennsylvania Department issued a Notice of Suspension for sixty days, effective July 10, 1973, which it rescinded pending the Court's action on this Petition.

REASONS FOR GRANTING THE WRIT

1. The record shows Appellant's due process rights were violated in the proceedings in the State Courts so that the Court below erred if they intended not to relieve Appellant from being required to submit to any administrative license hearing under the Pennsylvania Point System statute on the basis of his existing driver's record.

(a) The Federal Court below decided an important state question in conflict with applicable state law.

(i) The State failed to produce any records of convictions received by the Department from any Justices of the Peace, in proper form and the Secretary's records compiled therefrom showing how he assessed points to the licensee, at the trial of the case, and failed to make them part of the record, in the Pennsylvania Court, which was directly contrary to the Pennsylvania Superior Court's own ruling in the *Virnelson Case,* 212 Pa., Superior 359, 243 A2d, 464 (1968). The Virnelson case (*Supra*) limited the scope of the hearing on appeal to court under 75 P. S. 620 from a license suspension under the Point System, which hearings were *de novo* before. In the Virnelson

Case (*Supra*) the Court said that at the hearing provided for under 75 P. S. 620, on appeal from license suspension under the Point System, the Commonwealth had to first produce the records of conviction received by the Department from the Magistrates in the proper form, and the Secretary's records compiled therefrom, before it could make out a *prima facie* case for a suspension. The Court further stated at page 368 of said Opinion: "If the defendant wishes he may then proceed *to show he was not convicted* or *that the records or computations of the Secretary are incorrect.*" (Emphasis supplied) This is the leading decision in Pennsylvania which has been followed by the Courts in interpreting the Pennsylvania Point System Statute in 75 Purdon's Statutes 619.1 (*Supra*). Under the Pennsylvania Appellate Court Jurisdiction Act of 1970 (17 P. S. 211.101 *et seq.*), Jurisdiction of appeal from Common Pleas Court in License Suspension cases are now to the Commonwealth Court rather than the Superior Court as heretofore.

In *Commonwealth vs. Norman Bernstein*, 7 Comm. Ct. 594, 300 A2d 905 (1973), the Court said near the end of its Opinion (p. 907) "Consequently, *none of the required documents is in the record*, either physically or, since they were never formally introduced into evidence, validly. Not having these documents here before us, we are unable to determine whether they were the evidence described in Virnelson.

We are therefore unable to conclude that the Commonwealth met its burden of proving the appellee's convictions and the correctness of the Secretary's computation of points. See *Commonwealth v. Ross*, 6 Pa. Commonwealth Ct. 414, 296 A.2d 291 (1972).

"Affirmed."

(b) If the Court did not intend to relieve Appellant from any Administrative Hearing under the circumstances of the case, the Court below overlooked or misapplied the Federal questions involved in a way in conflict with the applicable decisions of your Honorable Court.

(i) Throughout the trial and at the informal conference, it is pointed out under the Statement herein, the Three members of the Court made numerous statements that due notice was not given to Appellant for the second alleged Motor Vehicle Code violation of June 5, 1968, and so he was denied due process. There was a wide variance between the Information made against Appellant and the conviction the minor judiciary entered and a Conviction Report that was sent to the Department of Transportation of Pennsylvania without any Notice to Appellant. As this second alleged "conviction" was invalid, the State could not assess Appellant's driver's license with five points for this second alleged offense. Therefore, Appellant would not have 11 points for which the Pennsylvania Department could suspend his license.

There is no right in a driver or duty of the State to have a Hearing at all, until there are 11 points. There is no right to appeal from mere assessment of points. (Jnt. App. 54-55.)

It is believed the Three Judge Court intended to relieve Appellant from being required to submit to any hearing under the Point system for the aforementioned reasons, on the basis of his then existing driver's record, according to the opinion and order and statements during the trial and informal conference.

(ii) *In Re: 1 1958, Plymouth Sedan vs. Commonwealth of Pennsylvania*, 380 U. S. 693, 14 L. Ed. 2d 170,

1965, was a civil proceeding in which the owner of a seized car argued there was an illegal search and seizure, which defense the government argued could only be raised in criminal proceedings. The Court held that the legality of the search and seizure could be raised in a civil proceeding and commented that this was a quasi-criminal proceeding in which the penalty was even more severe than in the criminal proceeding. It is also Hornbook law in Pennsylvania that even on a plea of guilty *to a charge of which defendant is notified*, the conviction may be collaterally attacked from the standpoint of validity of the plea or lawfulness of the sentence.

2. The Courts below erred in denying Appellant's motions and in not relieving him from having to submit to the hearing proposed and held by Appellees on April 12, 1972. The Statutory Court has permanently enjoined Appellees from suspending Appellant's drivers license under the Pennsylvania Point System statute, "unless, after an administrative hearing is granted in accordance with the Opinion of this Court, it be shown that there is sufficient reason for said suspension." (App. D, pp. 14a, 15a *infra*).

(a) The Courts below either overlooked or misapplied binding decisions of this Court concerning the type of Hearing to be given Licensee before suspension of their license, and a decision of the Third Circuit, itself.

(i) *Bell v. Burson*, 402 U. S. 535, 91 S. Ct. 1586 29 L. Ed. 2d 90 (1971) the Court said at page 96 (29 L. Ed. 2d 96) "*The hearing required by the Due Process Clause, must be 'meaningful'*, Armstrong v. Manzo, 380 U. S. 545, 552 (1965) and '*appropriate to the nature of the case.*' Mullane v. Central Hanover Bank & Trust Co., (*Supra*).

It is a proposition which hardly seems to need explication *that a hearing which excludes consideration of an element essential to the decision* whether licenses of the nature here involved shall be suspended does not meet this standard." (emphasis supplied) The Court further said at page 96 "While many controversies have raged about . . . the Due Process Clause, Mullane v. Central Hanover Bank & Trust Co., 229 U. S. , 212, it is fundamental that except in emergency cases (and this is not one) *due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective.*"

The Statutory Court in the case at bar quoted this last portion to which has been italicized. (App. D, pp. 9a-10a, *infra*).

(ii) In *Goldberg v. Kelly* (1970) 397 U. S. 254, 25 L. Ed. 2d 287 the Court held that procedural due process of the 14th Amendment required that Welfare recipients be afforded *an evidentiary* hearing *before* termination of benefits by Welfare Authorities. *Also, the Court held that the New York procedure giving a post-terminal hearing would not meet such requirement.* The Court further held at pages 269 and 270 "In almost every setting where important decisions turn on *questions of fact, due process requires opportunity to confront and cross-examine adverse witnesses.*" (Citing U. S. Supreme Court cases) . . . (emphasis supplied).

The Court further stated on Page 270, "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures any individual, *and the reasonableness*

of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show it is untrue . . . We have *formalized these protections in the requirements of confrontation and cross-examination.* They have ancient roots. They find expression in the Sixth Amendment . . . This Court has been zealous to protect these rights from erosion. *It has spoken out not only in criminal cases . . . but also in all types of cases where administrative . . . actions were under scrutiny.*" (emphasis supplied).

(iii) At the conference in Chambers when the State requested the elimination of the Clause on page 5 of the Opinion, which reads: ". . . That the fine and costs were paid on an Information at variance with that for which the Minor Judiciary entered a conviction as Plaintiff contends occurred in this case . . .," Judge Weis said: "On Page 5 of the Opinion I pointed out some of the things, without meaning to be conclusive, some of the things that might be involved in a hearing. I did not mean to say there might not be others which we had not thought about or had not discussed that might come up. I hesitate to say the hearing will be limited to these specific things because it was not my idea it would be limited to this ." (Jnt. App. 182).

Further Judge Weis said in the Opinion of the Three-Judge Court: "In *Ortiz v. Depuy*, 444 F2d. 429 (1971), the Court of Appeals of this Circuit was advised that Pennsylvania was revising its administrative procedures by requiring a prior adversary hearing to comply with the holding in *Bell vs. Burson, (Supra)*" (App. D, pp. 11a-12a). Further at the trial Judge Weis asked for Counsel for the State about this, who answered: "Mr. Maiorana: We did.

We went to the Circuit Court and told the Court we would strictly comply with the decision of the U. S. Supreme Court in Bell v. Burson as far as financial responsibility is concerned. Judge Weis: By that you mean you will have the hearing before you suspend the license? Mr. Maiorana: We will have a Departmental Hearing before we suspend the license of who was involved in an accident and did not have insurance at the time. In fact, *we will call in all the parties.* Judge Weis: Why can't the Department have a hearing in the Point System cases, too?" (Jnt. App. 163).

A distinction should not be made between presuspension Pennsylvania Departmental Hearings in Safety responsibility case, and Pennsylvania Departmental hearings before suspension of licenses under the Pennsylvania Point System, 75 P. S. 619.1. An adversary hearing should be held in the latter, too, and all parties should be called in. Particularly in view of the circumstances of the case at bar that the second alleged "conviction" of Appellant under the Pennsylvania Motor Vehicle Code was invalid, at least he should be given an opportunity to confront the witnesses so that he would have a chance to confront them and cross-examine them of which he was deprived by the type of hearing conducted on April 12, 1972.

In *Stanley v. Illinois*, in 31 L. Ed. 2d 551 (1972), the Court held an Illinois Statutory scheme as violative of Equal Protection and Due Process. The Court held that the Father who was not married to the mother of the children was entitled to a hearing of his fitness as a parent before his children were taken from him under the Illinois Statute.

In discussing the proposed April 12, 1972 Administrative Hearing with Appellee's counsel, on April 11, 1972, he again repeated arguments made by him at the trial of the case before the three Judge Court. He claimed that for the second alleged offense of June 5, 1968, it was proper for the Department to assess points, and proper to use it as a basis for suspending Plaintiff's license under the Pennsylvania Point System Statute, by including it in Plaintiff's point total (Jnt. App. 86). He also stated that that issue had already been decided by the Pennsylvania State Courts.

Also, Defendant's counsel stated that after the Departmental Hearing it was very conceivable that Plaintiff would have to appeal through the Pennsylvania State Courts again and admitted that this might be trying the case over again (Jnt. App. 86). He also remarked on April 11, 1972, "We're going to give him a Departmental Hearing and suspend him. You know that."

Here on the face of the record of hearing held April 12, 1972, the examiner admitted he had received no instructions concerning the format or the way the hearing in this particular case was to be conducted. He repeatedly said he was only to take the testimony as to the alleged third violation of July 30, 1969 (Jnt. App. 234, 235). Except for the Plaintiff's counsel insisting on it, there would have been no evidence taken at all concerning the second alleged offense which under the circumstances Plaintiff was compelled to produce. This was the invalid June 5, 1968 charge.

This hearing was not conducted in accord with the Opinion and Court Order of the Statutory Court. Also, although Defendant had not received formal approval of its regulations, policies and procedures concerning proposed Departmental Hearings like this, even if it had, it was admittedly not made known to the Hearing Examiner.

Therefore, the Hearing Examiner certainly wouldn't be able to conduct any hearing in accord with any plans submitted to the Statutory Court.

If the Statutory Court intended that Appellant had to submit to an Administrative Hearing, the "Hearing" given Appellant was an empty and hollow thing amounting to no "Hearing" at all. It certainly wasn't the Hearing mentioned by the Court in the Bell, and Goldberg cases (*Supra*).

It certainly wasn't "meaningful" and "appropriate to the nature of the case." Also, it was directly contrary to the intention of the Three-Judge Court as set forth in the Opinions thereof (App. D, pp. 6a-15a, and App. E, pp. 16a-28a).

3. Under the circumstances of the case, the Court of Appeals erred in ruling the denial of Appellant's Rule 62 (b) Motion was not a final order and therefore not appealable, and that the denial of the Rule 60 (b) Motion by a single Judge of a Three-Judge Statutory Court under the instant circumstances was not reviewable by it and in ruling the matter was moot because some Administrative Hearing had been given Appellant.

The Honorable Court below stated, ". . . it appearing that the matter is now moot because the Administrative Hearing Appellant wished stayed has already been held." (App. A, p. 2a). Throughout the Reasons given for granting the Writ, it has been pointed out that "The", "Administrative Hearing", . . . was not "The", "Administrative Hearing" ordered by the three-judge Court or in accord with your Honorable Court's decisions. Therefore, there remains a justiciable issue. Moore's Federal Practice, Vol. 6 A, § 57.13.

Of course, the Appellant is not appealing from the Order and Judgment of the Statutory Court of October 19, 1971, he is appealing from the Order of the Honorable Judge Louis Rosenberg dismissing Appellant's Motions under Rule 62 (b) and Rule 60 (b) entered April 11, 1972. Neither appellant nor defendant appealed the main Order and Judgment of October 29, 1971, so it has become final. The Order of April 11, 1972, of Judge Rosenberg denying the Rule 60 (b) Motion is a final Order and appealable as such *Gromelin v. Markwalter* (C. A. 5th (1950) 181 F. 2d 948, 949). While the denial Order brings up for review the matters pertinent thereto, it does not bring up the main Judgment for review; *Greenspahn v. J. E. Seagrams & Sons* (C. A. 2d 1951, 186 F. 2d 616). Although the main Judgment itself cannot be appealed, if the matters underlying the Judgment are pertinent to the Motions under Rule 62 (b) and 60 (b) it is proper that they be considered on appeal from denial of said Motions.

The Court of Appeals had jurisdiction of this Appeal under 28 U. S. C. A. 1291 as this was a "Final" decision of the District Court.

In Moore's Federal Practice, Vol. 9, § 110.14(2), at p. 199, Orders entered under F. R. C. P. 60, "Appeals after Final Judgment.", "Courts of Appeals; Jurisdiction", says: "An Order modifying a Judgment under Rule 60(a) and (b) is final and appealable,[3] as is an Order refusing modification or vacation.[4] The appeal permits review only of the Order granting or denying relief; it does not permit attack upon the original Judgment.[5]" (citing cases).

Moore's Federal Practice, Vol. 9, § 110.14(1) at page 197, states: "If a post-judgment Order is apparently the last Order to be entered in the action, it is final and appealable."

Appellant did file suit under 28 U. S. C. A. 2281, *et seq.*, attacking the constitutionality of the Pennsylvania Point System Statute and its application to him under the circumstances. The Statutory Court granted a permanent injunction so that the Appeal taken to the Circuit Court of Appeals was not an appeal that had to be taken to your Honorable Court under 28 U. S. C. A. 1253, which are direct appeals from decisions of three-Judge Courts: "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. (June 25, 1948, c. 646, § 1, 62 Stat. 928.)"

Learned Judge Aldisert, of the Third Circuit, refers in his Order to 28 U. S. C. A. 2284 (5), in saying: "That the denial of the Rule 60 (b) Motion under the circumstances here presented, is not reviewable by this Court . . ." (App. A, pp. 1a-2a). 28 U. S. C. A. 2284(5) says: " . . . Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure." This would include a Motion under Rule 60 (b) such as the one at bar. It would have been more desirable to have all the three Judges of the Statutory Court pass on Appellant's Motions under 60 (b) and 62 (b) but as pointed out, no other Judges were available. His Honor Judge Rosenberg of the District Court could have stayed the Administrative Hearing scheduled for the following day pending consideration of the 60 (b) Motion by the Full Court, but did not.

The aforesaid Motions were only to relieve Appellant from undergoing any Administrative Hearing under the circumstances of the case or from having to undergo the Hearing proposed by Appellees. It was not an appeal from the granting of the Permanent Injunction under the aforesaid 28 U. S. C. A. 1253.

(a) If the Honorable Court of Appeals meant the Court of Appeals didn't have jurisdiction because the full statutory court did not act on these Motions, that Court has rendered a decision in conflict with one of its own decisions and with the decision of another Court of Appeals on a similar matter.

(i) In *Spencer v. Kugler*, 454 F2d 839 (1972), Judge Aldisert affirmed the action of a single judge's dismissal of one count which sought the same relief as that requested in a second count which second count had been denied by a three-judge statutory Court. A direct appeal had been filed under 28 U. S. C. A. 1253 to the Supreme Court from the three-judge determination.

(ii) In *Hamilton v. Nakai*, 453 F2d 152 (CA 9) (1972) that Circuit held that a Petition for Writ of Assistance to enforce a Decree by a Three-Judge Court can be heard by a single Judge and his ruling is appealable to the Court of Appeals. 28 U. S. C. 2284(5) was discussed.

(iii) In *Great Falls Gas Company v. Public Service Commission of Montana*, 39 F2d 176 (1930), it was held a single judge has jurisdiction to amend a decree granting permanent injunction after hearing before three judges, if necessary to conform to proof.

In Moore's Federal Practice, Vol. 9, § 110.03(3), at page 73, it states, "Courts of Appeals now regularly accept juris-

diction on appeal from judgments of single judges denying relief in actions arguably required to be heard by a three-judge court[18] (citing cases)."

In Volume 7 of Moore's Federal Practice, it says at page 237 that where the District Court has power to act pursuant to provision of Rule 60 (b) among the relevant propositions and factors they may consider in exercising their discretion are that "the Rule should be liberally construed for the purpose of doing substantial justice." This same noted author says that at pages 418 and 419 (*Supra*) "The scope of Appellate review will depend upon the issue involved, for example, *an issue of law is involved and reviewable as such:* where the issue is whether the Motion is made within the maximum time permitted by the Rule so that the District Court has power to grant relief; *where the issue is whether as a matter of law relief is proper.* On the other hand where the grant or denial of relief depends upon a discretionary appraisal of the facts in a particular case the District Court's determination is subject to review only for abuse" (emphasis supplied).

Appellant submits that as a matter of law relief would be proper in this case relieving Plaintiff from having to submit to any Administrative License Hearing offered by the State on the basis of his present driver's record. Or, at least Appellees should be made to give Appellant a "hearing" in accord with your Honorable Court's decisions.

Possibly this is somewhat a gray area, as to whether or not an Appeal lies to the Court of Appeals or a direct appeal should have been taken to your Honorable Court. However, in the interest of justice and the finality of Court proceedings and the ending of litigation, the Court of Appeals should have either disposed of the questions

raised by Appellant, certified the case to your Honorable Court or remanded it for hearing by the full three-judge Court. If your Honorable Court denies Certiorari, Appellant will have to again have his case retried in the State Courts of Pennsylvania and then conceivably apply again to the Federal Courts for a three-judge Statutory Court. It is the policy of the law to end litigation.

Conclusions

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Washington, Pennsylvania 15301.

JEROME HAHN, Esquire,
211 Washington Trust Building,
Washington, Pennsylvania 15301.

Attorneys for Petitioner.

APPENDIX A

Opinion and Order of the Court of Appeals (May 16, 1973)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 72-1529

JOHN REESE,

Appellant,

v.

JACOB G. KASSAB, Secretary of the Department of Transportation of Pennsylvania and

JULIUS A. TROMBETTA, Director of the Bureau of Traffic Safety of Pennsylvania.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Submitted under 3rd Cir. Rule 12(6) April 27, 1973.

Before VAN DUSEN, ALDISERT and ROSENN, *Circuit Judges.*

Jerome Hahn, Esq., Washington, Pa. Attorney for Appellant.

Anthony J. Maiorana, Assistant Attorney General, Robert W. Cunliffe, Deputy Attorney General, and J. Shane Creamer, Attorney General, Harrisburg, Pa. Attorneys for Appellees.

Appendix A—Opinion and Order of the Court of Appeals (May 16, 1973).

ORDER DISMISSING APPEAL

After consideration of appellant's contentions and having determined that the denial of the Rule 62(b) motion was not a final order and therefore not appealable, and that the denial of the Rule 60(b) motion, under the circumstances here presented, is not reviewable by this court, 28 U. S. C. § 2284(5), and further, it appearing that the matter is now moot because the administrative hearing appellant wished stayed has already been held,

It is ORDERED AND ADJUDGED that this appeal be dismissed. Costs taxed against appellant.

BY THE COURT:
ALDISERT, *J.*,
Circuit Judge.

Dated: May 16, 1973.

APPENDIX B

Order Denying Motion to Enlarge Time in which to file Petition for Rehearing (June 12, 1973)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 72-1529.

JOHN REESE,

Appellant,

v.

JACOB G. KASSAB, *et al.*

Present: VAN DUSEN, ALDISERT and ROSENN,
Circuit Judges.

ORDER

Treating the May 30, 1973, letter of Jerome Hahn, Esq., attorney for appellant, received and filed May 31, 1973, as a motion to enlarge the time within which to file a petition for rehearing, it is

ORDERED that the motion be and the same is hereby denied.

BY THE COURT,
ALDISERT, *J.*,
Circuit Judge.

Dated: June 12, 1973.

APPENDIX C

Order of District Judge Louis Rosenberg Denying Motion to Stay Proceedings under Rule 62 (b), and Motion under Rule 60 (b) (April 11, 1972)

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-551

JOHN REESE,

Plaintiff,

v.

JACOB G. KASSAB, Secretary of the Department of Transportation of Pennsylvania and

JULIUS A. TROMBETTA, Director of the Bureau of Traffic Safety of Pennsylvania,

Defendants.

ORDER

AND NOW, TO-WIT, this 11th day of April 1972, the motion of the plaintiff to stay the proceedings under Rule 62(b) pending disposition of the motion under Rule 60(b) and the plaintiff's motion under Rule 60(b) are hereby denied.

LOUIS ROSENBERG,
United States District Judge.

Appendix C—Order of District Judge Louis Rosenberg Denying Motion to Stay Proceedings Under Rule 62 (b), and Motion Under Rule 60 (b) (April 11, 1972).

cc: The Honorable Austin L. Staley,
The Honorable Joseph F. Weis, Jr.,

Jerome Hahn, Esq.,
211 Washington Trust Bldg.,
Washington, Pa. 15301,

Anthony J. Maiorana, Assistant
Attorney General,
203 Transportation & Safety Bldg.,
Harrisburg, Pennsylvania 17123.

APPENDIX D

Opinion of Three-Judge Statutory Court (October 26, 1971)

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-551

JOHN REESE,

Plaintiff,

vs.

JACOB G. KASSAB, Secretary of the Department of Transportation of Pennsylvania and

JULIUS A. TROMBETTA, Director of the Bureau of Traffic Safety of Pennsylvania,

Defendants

OPINION.

JOSEPH F. WEIS, JR., *District Judge.*

The Pennsylvania "Point System" is under attack in this case, the plaintiff contending that the procedure providing for suspension of a driver's license without an administrative hearing violates the due process requirements delineated by the United States Supreme Court in the recent case of *Bell v. Burson*, 402 U. S. 535, 91 S. Ct. 1586, 29 L.Ed. 2d 90 (1971).

Appendix D—Opinion of Three-Judge Statutory Court (October 26, 1971).

The statute enacted by the Pennsylvania legislature[1] provides a system of assessing "points" by the Secretary of the Department of Transportation upon receipt of notification of convictions of certain specified violations of the Motor Vehicle Code. Notice is given to the driver of the imposition of the points on each occasion and when a total of 11 points is accumulated, the Secretary is directed to suspend the operator's license for a period of 60 days. There are other provisions of the Act providing for point credits for attending driver improvement school, and also for each year of a conviction-free driving record.

No administrative hearing is provided either upon each assessment of points or before suspension, but after the penalty has been imposed an appeal may be taken to the Commonwealth Court.[2]

The Stipulation of Facts shows that the plaintiff John Reese is a truck driver whose livelihood depends upon his ability to operate a motor vehicle. His record with the Department of Transportation reveals the following:

1. An arrest on September 26, 1967 for speeding; fine and costs were paid without a hearing and 6 points were assigned by the Secretary on October 21, 1967.
2. Reese attended driver improvement school in January of 1968 and received a credit of 1 point.

[1] 75 P. S. § 619.1.

[2] 75 P. S. § 620. The right of appeal was originally to the Court of Common Pleas but was amended to Commonwealth Court effective June 3, 1971. The Commonwealth Court, as well as the Common Pleas Court, has the discretionary power of supersedeas.

3. On June 24, 1968 the plaintiff paid a fine and costs for violating Section 1028(a) of the Motor Vehicle Code dealing with traffic signals. Five more points were assigned.
4. No convictions having been entered from June 24, 1968 to June 2, 1969, the plaintiff received a credit of 2 points.
5. On July 30, 1969 Reese was charged with speeding, paid the fine and costs without a hearing. On receipt of notification of this proceeding the Secretary assigned 3 points.

Since the plaintiff at this point had a total of 11 points, his license was suspended by the Secretary for a period of 60 days. Thereafter, the plaintiff took an appeal to the Court of Common Pleas of Washington County, Pennsylvania, contending that he was not guilty of the violations for which points had been assessed and that there was a fatal variance between the information and conviction for violation of Section 1028 (a) of the Motor Vehicle Code which was alleged to have occurred on June 24, 1968 (item 3 above.)

The Court of Common Pleas granted the Commonwealth's motion to quash the appeal and on a motion for rehearing, the previous ruling was affirmed, the court relying upon the case of *Commonwealth v. Virnelson*, 212 Pa. Super. 359, 243 A. 2d 464 (1968) which held that there could be no review of the facts behind the convictions giving rise to the assessment of points and that the only matter which might be shown was improper calculation of the points. Under Pennsylvania law payment of fine and costs is equivalent to a plea of guilty and in the context of this case would be an admission of a conviction. *Commonwealth v. Virnelson, supra.*

Appendix D—Opinion of Three-Judge Statutory Court (October 26, 1971).

Reese perfected an appeal to the Superior Court of Pennsylvania which affirmed the action of the Common Pleas Court. The Supreme Court of Pennsylvania refused to grant allocatur.

Alleging that the Point System Act was unconstitutional, the plaintiff then filed this suit for an injunction to prohibit the Secretary from suspending his license. Since the requisite jurisdictional grounds exist, this three-judge statutory court was convened.

There can be no quarrel with the Commonwealth's position that in order to regulate the use of its highways, the state does have power to enact the Point System Plan into law and that it may use infractions of the Vehicle Code as a basis for license suspension. We may say further that the legislation is an intelligent and commendable effort to diminish the carnage on our highways by focusing attention on the most common cause of accidents, the careless and code-violating driver. However, it is not enough that the substantive provisions of a statute pass constitutional muster because it is also necessary that the methods of administration meet appropriate standards of due process.

Bell v. Burson, supra, makes it clear that even if denominated a privilege, as the Pennsylvania Court did in *Commonwealth v. Funk*, 323 Pa. 390, 186 A. 65 (1936), nevertheless an operator's license is not to be taken away by state action which fails to comply with procedures required by the Fourteenth Amendment.

The Commonwealth in its brief concedes, and our independent examination confirms, that the "Point System" Act

makes no provision for departmental administrative hearing at any time before suspension. Section 618 (h) of the Vehicle Code provides that after notice of suspension, any person may request a departmental hearing but it is not the practice to notify the licensee of the availability of this opportunity.[3] See *In Re Hamsher Motor Vehicle Operator License Case*, 196 Pa. Super. 336, 175 A. 2d 303 (1961). Similarly, judicial review under Section 620 of the Code is provided only after suspension.

We find that this falls short of what the Constitution requires. As was said in the *Bell* case:

> ". . . it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective." 402 U. S., at 542.

Here the state furnished neither notice nor opportunity for Reese to be heard either at an administrative hearing or *de novo* before a court before the termination.

The Commonwealth contends that because the action of suspension by the Secretary is not discretionary under the Act, an administrative hearing is not required.

We point out, however, that even if the convictions cannot be contested, there still remain the possibilities, among

[3] "Whenever the Secretary suspends the operator's license . . . of any person, the Secretary shall immediately notify such person and afford him an opportunity of a hearing before said Secretary or his representative, provided such hearing has not already been held . . ." 75 P. S. § 618(h).

others, that the convictions were those of another person with the same name; that the fines and costs were paid on an information at variance with that for which the minor judiciary entered a conviction as plaintiff contends occurred in this case; that the points were improperly calculated; that credits were wrongfully withheld; or that there were errors on the report of conviction form. In one of these instances is there a provision for a hearing before suspension even though notice of the assessment of points is given.[4] Notice without opportunity to rectify error obviously is not sufficient.

As an indication that an administrative hearing before suspension would not be a novel or undue burden on the Commonwealth even if that were material—we point out that 75 P. S. § 618 (b) requires that a hearing be held *before* suspension in certain enumerated situations, some of which involve mandatory revocation in the event of conviction in the criminal courts.

Furthermore, the state's Motor Vehicle Safety Responsibility Act[5] utilizes license suspension as a sanction and, while the Commonwealth contends that such action by the Secretary is discretionary, in practice it has been utilized as a matter of course when there has been a failure to comply with the statute. In *Ortiz v. DePuy*, 444 F. 2d 429 (1971) the Court of Appeals of this Circuit was advised

[4] In *Wilson Motor Vehicle Operators case*, 281 Pa. Super. 309, 280 A. 2d 820 (1971) an appeal from a specific assessment of points was sustained by a Court of Common Pleas but reversed by the Superior Court on the basis that there was no provision in the Act for such a procedure.

[5] 75 P. S. § 1404 *et seq.*

that Pennsylvania was revising its administrative procedures by requiring a prior adversary hearing to comply with the holding in *Bell v. Burson, supra.*

There is nothing in Sections 618 or 619 which would prevent the Department of Transportation from promulgating appropriate regulations to provide for a prior administrative hearing in Point System cases, just as is being done in Financial Responsibility matters.

In short, we hold that before an operator's license can be suspended by the Secretary under the terms of the Pennsylvania Point System, there must be notice and opportunity for a hearing before the action becomes effective.

We share the concern for necessary highway safety programs discussed in the concurring opinion and emphasize that the ruling in this case will not impair the effective operation of the Point System in any material fashion.

Plaintiff also contends that the statute involves an unlawful delegation of power by the legislature to the Secretary and that the failure of the Commonwealth to produce certain records in the Court of Common Pleas constituted lack of due process. In view of our disposition of the case, we do not feel it necessary to pass upon these points particularly since they are of doubtful validity.

An appropriate injunction will be issued.

AUSTIN L. STALEY,
Senior Circuit Judge,

JOSEPH F. WEIS, JR.,
District Judge.

cc:

Jerome Hahn, Esquire,
211 Washington Trust Building,
Washington, Pennsylvania 15301.

Anthony J. Maiorana, Esquire,
Assistant Attorney General,
Department of Transportation,
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Harrisburg, Pennsylvania 17123.

Appendix D—Opinion of Three-Judge Statutory Court (October 26, 1971).

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-551.

JOHN REESE,

Plaintiff,

vs.

JACOB G. KASSAB, Secretary of the Department of Transportation of Pennsylvania and JULIUS A. TROMBETTA, Director of the Bureau of Traffic Safety of Pennsylvania,

Defendants.

ORDER.

And Now, to-wit, this 26th day of October, 1971, IT IS ORDERED that Jacob G. Kassab, Secretary of the Department of Transportation of Pennsylvania and Julius A. Trombetta, Director of the Bureau of Traffic Safety of Pennsylvania, their successors in office, agents, servants and employees, and all persons acting by, through or under them, be and are permanently enjoined from suspending plaintiff's operator's license as provided by the Act of Assembly 1959, April 29, P.L. 58 § 619.1, added 1966, January

24, P.L. [1965] 1497 § 2, unless, after an administrative hearing is granted in accordance with the Opinion of this court, it be shown that there is sufficient reason for said suspension.

IT IS FURTHER ORDERED that this Order is to take effect as of the date of signing thereof, and this court is to retain jurisdiction of the entire cause until such time as defendants' regulations, policies, and procedures exhibit full compliance with this Order and Opinion.

AUSTIN L. STALEY,
Senior Circuit Judge,

LOUIS ROSENBERG,
District Judge,

JOSEPH F. WEIS, JR.,
District Judge.

APPENDIX E

Concurring Opinion Judge Rosenberg (October 26, 1971)

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-551.

JOHN REESE,

Plaintiff,

vs.

JACOB G. KASSAB, Secretary of the Department of Transportation of Pennsylvania and JULIUS A. TROMBETTA, Director of the Bureau of Traffic Safety of Pennsylvania,

Defendants.

CONCURRING OPINION.

ROSENBERG, *District Judge.*

The petitioner in the instant case alleges that the suspension of his operator's license prior to an opportunity to demonstrate that the Secretary's records are in error, constitutes a violation of his rights to due process, guaranteed by the Fourteenth Amendment.

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U. S. 385,

Appendix E—Concurring Opinion Judge Rosenberg (October 26, 1971).

394 (1914). See also, *Armstrong v. Manzo*, 380 U. S. 545 (1965); the concurring opinion of Mr. Justice Frankfurter in *Anti-Fascist Committee v. McGrath*, 341 U. S. 123 (1951); *Davis v. Weir*, 328 F. Supp. 317 (N. D. Ga. 1971); *Ackies v. Purdy*, 322 F. Supp. 38 (S. D. Fla. 1970). However, it must be remembered that "Due process is not a fixed, inflexible procedure which must be accorded in every situation. It varies with the circumstances involved." *Baker v. Downey City Board of Education*, 307 F. Supp. 517, 522 (D. C. Calif. 1969). And one of the primary instances in which due process may be limited is in the valid exercise of reasonable police powers, *Wilson v. Webster*, 315 F. Supp. 1104 (D. C. Calif. 1970).

"The power of the State to regulate the use of its highways is broad and pervasive." *Bibb v. Navajo Freight Lines*, 359 U. S. 520, 523 (1959). And the state may impose reasonable restrictions on such use, in the interests of public safety. *Wilkinshaw v. State of Pennsylvania*, 119 F. Supp. 722 (W. D. Pa. 1954). To further this end, the legislature of Pennsylvania enacted § 619.1 of the Motor Vehicle Code, the "Point system for driver education, testing and suspension".

Section 619.1 provides that the Secretary maintain records of convictions of every person licensed by the Commonwealth, and that upon receipt of information concerning conviction, he assign a prescribed number of points to that individual's record. In addition, it is provided that when an individual accumulates 11 points, the Secretary must suspend such person's operator's license or learner's permit. No discretionary determination is sanctioned, but

rather a mandatory act on the part of the Secretary. However, an individual always has a right to appeal any conviction[1], and upon successful appeal to have the points eliminated. Furthermore, every driver in Pennslyvania is held to have knowledge of the point system, and recognize that conviction will result in the assessment of a fine and assignment of points to his record.[2]

Therefore, the time to appeal, and the allowance of a day in court with full procedural due process is provided in the statutory procedure for appealing from convictions by a magistrate. This day in court is what is contemplated by due process. Having failed to take advantage of this constitutional right, it does not appear warranted to accord an individual the opportunity to oppose the summary suspension of his license when he at no time opposed those matters which cumulatively created the situation which eventuated in suspension. "It is sufficient for the purpose of due process that the statute or statutes are drawn in

---

[1] 75 P. S. § 1215.

[2] The record in the present case discloses as follows:

1. That on or about October 21, 1967, petitioner was convicted for speeding at the rate of 76 miles per hour in a 65 mile per hour zone in violation of Section 1002(b)(7) of the Code.

2. That petitioner attended Driver Improvement School in January 1968 for which he received a credit of one point.

3. That on or about June 24, 1968 petitioner was convicted of disobeying a traffic signal, and fined $5.00 plus costs, and assigned 5 points.

4. That there then ensued a period of one year in which no convictions occurred, and for which petitioner received a two point credit.

5. That on or about August 28, 1969 petitioner was convicted of speeding at a rate of 55 miles per hour in a forty-five miles per hour zone, in violation of Section 1002(c) of the Code. A fine of $10.00 plus costs was paid and 3 points were assigned.

Appendix E—Concurring Opinion Judge Rosenberg (October 26, 1971).

such a manner as to notify the actor of the prohibited conduct." *United States ex rel. Shell Oil Co. v. Barco Corporation*, 430 F. 2d 998, 1001, C. A. 8, 1970.

Closely analogous to the present situation is that of individuals sentenced to life imprisonment as habitual offenders. In *Whiteley v. State of Wyoming*, 293 F. Supp. 381 (D. C. Wyo. 1968), affirmed 416 F. 2d 36, C. A. 10, 1969, reversed 401 U. S. 560 (1971), the District Court held that "Upon proof that petitioner had been convicted of a felony three times previous to the conviction about which he now complains, the trial court properly enhanced petitioner's punishment by imprisonment in the state penitentiary for not less than life," in accordance with the Wyoming statute on habitual offenders, 293 F. Supp. at 386. The Court of Appeals for the Tenth Circuit affirmed without reference to the state's habitual offender statute, and the Supreme Court in reversing likewise did not refer to that statute. Both appellate courts concerned themselves with the issue of probable cause for arrest.

> "Even though an habitual criminal charge does not state a separate offense, the determination of whether one is an habitual criminal is 'essentially independent' of the determination of guilt of the underlying substantive offense . . . Thus, although the habitual criminal issue may be combined with the trial of the felony charge, 'it is a distinct issue, and it may appropriately be the subject of separate determination . . .
>
> "Nevertheless, a defendant must receive reasonable notice and an opportunity to be heard relative to the recidivist charge even if due process does not require that notice be given prior to the trial on the substantive offense . . . ." *Oyler v. Boles*, 368 U. S. 448, 452 (1962). Cited in *United States ex rel. Swingle v. Rundle*, 318 F. 2d 64, C. A. 3, 1963.

Appendix E—Concurring Opinion Judge Rosenberg (October 26, 1971).

However, the relevant Pennsylvania statute[3] vests the trial judge with discretionary authority to impose a life sentence on an habitual criminal. Contrasted with this, is the mandatory imposition of license suspension under the Code. There is no discretionary provision in the Code which would enable an individual to allege that a different or lesser penalty might have been imposed, as in the habitual criminal act.

Accordingly, the analogy is useful for a limited purpose only, because under the habitual criminal statutes, the penal provisions are discretionary, while in the motor vehicle license suspension cases, the suspension is mandatory. Thus an individual on trial as a fourth offender under the Pennsylvania habitual criminal statutes cannot be certain that the court will exercise its discretion, and should be permitted to come forth and show why a life sentence should not be imposed, whereas, an individual who acquires 11 points under the Code is held to have had prior knowledge that conviction of the offenses would result in mandatory suspension of his operator's license. The final motor vehicle conviction contains the inherent penalty of license suspension, and an individual should not be permitted to collaterally attack prior convictions when he failed to do so directly, and in fact acquiesced to the convictions.

Likewise, it has been held that where a criminal defendant attempts to enter a guilty plea, he must be aware of his possible treatment as an habitual offender or one ineligible for parole. See *Bye v. United States*, 435 F. 2d

[3] 18 P. S. § 5108.

177, C. A. 2, 1970,[4] and cases cited therein. However, even the analogy of lack of information on which to make an intelligent plea, which the Court reviewed in *Bye*, falls in view of the fact that the ineligibility for parole was an exception to the general provisions of law, and that an individual may rely on the generally held belief that he will be eligible for parole after serving one-third of his sentence.[5]

Those licensed by a state to operate motor vehicles on its highways are charged with the knowledge that a violation of the Code will result in liability for the payment of a fine and the assignment of a specified number of points to that individual's record, and that on the accumulation of 11 points automatic license suspension will result. Accordingly, it seems to me that the licensed public is charged with knowledge of the provisions of the Pennsylvania Motor Vehicle Code; that all motor vehicle operator licensees must abide by the rules of the road, and that upon failure to do so to stand liable and submit to the penalty of a fine and points, and such suspension and revocation as are set forth in the Act.

I find it difficult to separate the penalty into two separate parts so as to indicate that the payment of a fine is one thing, and the imposition of points is another. In reality the paying of the fine and the imposition of the points are one and the same, since by legislative mandate the latter accompany the former. The only difference is

[4] In *Bye v. United States, supra,* petitioner claimed that he had not been informed that as a consequence of pleading guilty to a narcotics offense he would be ineligible for parole. The Court held that it could not be said that the petitioner voluntarily entered his plea when he was not informed that he would be ineligible for parole.

[5] See 18 U. S. C. § 4202.

that in the case of the payment of the fine, it is the committing magistrate who imposes the penalty, and in the case of the points, it is the Secretary acting under the provisions of the Code.

Under Pennsylvania law, an individual who is convicted of a motor vehicle offense and has a fine imposed upon him may still appeal the conviction to the proper court where he may test the right or wrong of the charge made before the magistrate. If he prevails on appeal, both the fine and any assigned point penalties must fall; if he does not prevail on the merits, he must pay the fine and point encumbrances, but that is not to say that the point penalty then is to be considered separately. He knows of the conviction and he has had notice and opportunity to defeat it. So when an individual has several convictions and the assigned points add up to 11, he has a continuing notice and the opportunity to take appeals on the merits. Under these circumstances, I do not see that there is a failure of due process when he, himself, should know that when 11 points are accumulated it is mandatory that the Secretary suspend his license.

In the present situation, the repeated nature of the offenses, and the non-discretionary duty of the Secretary compel the conclusion that in all probability the petitioner is the type individual which the Commonwealth sought to exclude from its highways in the interests of public safety. In almost every case of this sort, a hearing prior to the suspension would serve no valid purpose other than putting the Commonwealth to the added burden of providing a hearing which would disclose that the assignment of 11 points to the individual's driving record was properly made.

Appendix E—Concurring Opinion Judge Rosenberg (October 26, 1971).

However, as the majority indicates, there does exist the extremely remote possibility that compounded errors could result in the suspension of the license of an innocent individual. Under these circumstances, which I feel are highly improbable, a miscarriage of justice would result in an individual being deprived of his operator's license without due process of law.

Prior to the addition of § 619.1 when the 1959 codification of § 618(b)(2) was effective, the Secretary was vested with discretionary power to determine when an operator-licensee should be cited for a license suspension hearing. Thereafter an appeal from such discretionary suspension by the Secretary was to the court of common pleas or the County Court of Allegheny County, which courts had broad power to reverse the suspension for various reasons including operational hardship.

Section 619.1, as enacted in 1966 removed this discretionary power from the Secretary and made it mandatory for him to suspend a license when eleven points were charged against the operator for convictions of motor vehicle violations. The legislature then gave the licensee the right of appeal under § 620 to the court of common pleas of the county in which the operator resides or the County Court of Allegheny County to determine from the records of convictions before the magistrates and the records of the court whether the suspension was given in accordance with the mandate of § 619.1.[6] At such hearing the operator is permitted to show only that he was not convicted or that

[6] With the founding of the Commonwealth Court, appeals from license suspensions are not made to that Court rather than to the court of common pleas or County Court of Allegheny County.

Appendix E—Concurring Opinion Judge Rosenberg (October 26, 1971).

the records or computations of the Secretary are incorrect. *Virnelson Motor Vehicle Operator License Case,* 212 Pa. Superior 359 (1968). The court can inquire no further than this and it may not retry the merits of the convictions or upset the penalties provided for such violations.

As Judge Jacobs said in *Virnelson* at page 368, "The discretion in these cases has been exercised by the legislature. The method of suspension is no longer a matter for determination by either the secretary or the courts."

Section 620 gives one against whom the suspension has been directed thirty days to take an appeal to the appropriate court to test the correctness of the suspension. Under ordinary circumstances this should not take away from the due process requirement of the law. However, the majority is of the opinion that the right to show the incorrectness of such a suspension should occur prior to the suspension being made by the Secretary.

While I yield to the thinking of the majority that the innocent individual under these remote conditions should be provided with notice and an opportunity to be heard prior to suspending that individual operator's license, I would emphasize the fact that I am of the firm opinion that the point system is, if not the best, at least a necessary procedure for the purpose of eliminating the offending licensee from the highways both for his own protection as well as for the protection of the general public. For no one will doubt that if ever our highways needed law enforcement for the preservation of the public safety, it is today. We all readily admit that there are too many users of the highways who do need to be supervised and apprehended.

Appendix E—Concurring Opinion Judge Rosenberg (October 26, 1971).

And where the law is plain enough we ought not to accept superfluous technical excuses that will help to defeat the safety protection on which the public depends.

It has been held that an operator's license represents a right or privilege which is ". . . not to be taken away without that procedural due process required by the Fourteenth Amendment." *Bell v. Burson*, 402 U. S. 535, 539 (1971). The latter case, upon which the majority relies concerns itself with the requirements of due process as it relates to financial responsibility, and consequently Bell does not guide us factually here. But we should not lose sight of the fact that licensing is also a right of the public for protection in the use of the highway. If it were not so, why should there be any licensing at all? Why should not every person who desires to drive an automobile or another vehicle on the highway be permitted to do so without a license? The very fact that an individual is required to have a license also carries with it certain responsibilities, and when such an operator-licensee violates those responsibilities, then the State should have the right and the duty to avail itself of simple procedures for the purpose of enforcing its rules for safety on the highways. I agree that there is no preliminary provision for matters of error in the computation of points or of mistaken identity of an individual in a suspension case, and I believe that there should not be an after-hearing on any errors that may have been committed in the office of a magistrate or even in a court. I believe that the simple record of the magistrate or the court indicating that a fine had been paid upon a particular charge and that no successful appeal was prosecuted should be conclusive. But since there is no provision

Appendix E—Concurring Opinion Judge Rosenberg (October 26, 1971).

in the law, or any rules which allow for correction of errors prior to suspension, I must agree that a procedure is lacking to assure the right of a charged person to present limited factual matters, as to the plaintiff here, matters such as identity and point accumulation accuracy. As the Supreme Court stated in *United States v. O'Brien,* 391 U. S. 367, 377 (1968), a governmental regulation ". . . is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest . . ." See also, *Martin v. Davison,* 322 F. Supp. 318 (W. D. Pa. 1971). The reasonableness of any regulation is to be judged by the context in which it is applied. *Gfell v. Rickelman,* 441 F. 2d 444, C. A. 6, 1971. And ". . . it is fundamental that except in emergency situations . . . due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective." (Emphasis supplied.) *Bell v. Burson, supra,* at page 542.

Thus, while I firmly believe that § 619.1 of the Pennsylvania Motor Vehicle Code is a valid exercise of police power, I am bound to support the ultimate conclusion reached by the majority only on the remote possibility that a summary suspension might inadvertently deprive an innocent person of his operator's license without due process of law. For the limited purpose of inquiring into the propriety of the Secretary's record, and not for the purpose of authorizing a review of each of the constituent cases or their respective penalties whether fines or points, or both, I join in the result reached by the majority.

APPENDIX F

Court Order Amending Opinion of October 26, 1971 (November 4, 1971)

ORDER OF COURT

And Now, to-wit, this 4th day of November, 1971, It Is Ordered that the Opinion in the above case filed on October 26, 1971 be and the same is amended as follows:

Page 2, first full paragraph, third line, delete: "Commonwealth Court" and substitute therefor; "Court of Common Pleas, in the county wherein the licensee resides."[2]

Page 2, footnote 2, delete: "The right of appeal was originally to the Court of Common Pleas but was amended to Commonwealth Court effective June 3, 1971. The Commonwealth Court, as well as the Common Pleas Court, has the discretionary power of supersedeas." Substitute therefor: "An appeal from the Court of Common Pleas originally was taken to the Superior Court, but was amended to the Commonwealth Court. Act of July 31, 1970, P. L. ——, No. 223, Art. IV, § 402(3), 17 P. S. § 211.402(3). The Commonwealth Court, as well as the Common Pleas Court, has the discretionary power of supersedeas."

AUSTIN L. STALEY,
Senior Circuit Judge.

LOUIS ROSENBERG,
District Judge.

JOSEPH F. WEIS, JR.,
District Judge.

APPENDIX G

Court Order Amending Concurring Opinion of October 26, 1971 (November 5, 1971)

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTREN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-551.

JOHN REESE,

Plaintiff,

v.

JACOB G. KASSAB, Secretary of the Department of Transportation of Pennsylvania and JULIUS A. TROMBETTA, Director of the Bureau of Traffic Safety of Pennsylvania,

Defendants.

ORDER.

AND NOW, TO-WIT, this 5th day of November 1971, IT IS HEREBY ORDERED that the Concurring Opinion in the above case filed on October 26, 1971 be and the same is hereby amended as follows:

> Footnote 6, page 9, which reads "With the founding of the Commonwealth Court, appeals from license suspensions are now made to that Court rather than to the court of common pleas or County Court of Allegheny County"

shall be deleted in its entirety.

LOUIS ROSENBERG,
United States District Judge.

APPENDIX H

Pennsylvania Statute

§ 1028. Traffic Signal or Signs Interpretations

(a) It shall be unlawful for the driver or operator of any vehicle, streetcar, or trackless trolley omnibus to disobey the directions of any traffic signal or signs placed in accordance with the provisions of this act unless otherwise directed by a peace officer.

(b) Whenever traffic at an intersection is alternately directed to stop and go, by the use of traffic signals, the colored lights shall indicate as follows, except as otherwise provided in this section:

(1) Green.—Traffic facing the signal may proceed straight ahead, and make right or left turns, except where no such turns are permitted, when so indicated by official signs. Vehicular traffic shall yield the right of way to pedestrians crossing or who have started to cross the roadway on the green signal and vehicles lawfully within a crosswalk or the intersection at the time such signal was exhibited.

(2) Yellow—When shown alone.—Traffic facing the signal shall stop before entering the nearest crosswalk at the intersection, but if such stop cannot be made in safety, a vehicle may be driven cautiously through the intersection.

(3) Red.—Traffic facing the signal shall stop before entering the intersection, and remain standing until green is shown. No movement or turns shall be lawful on red except as otherwise provided in this section.

(4) No "U" turns shall be made on a two-way street in a business or residence district, unless they shall be made back of the intersection on such signal, and at such times and places as may be indicated by official signs.

(c) Where official signs indicate turns, as provided in this section, they shall be attached to the traffic signals, or immediately adjacent thereto, and they shall be clearly illuminated at night.

(d) The traffic signal interpretations set forth in this section shall not apply to vehicles, when operated with due regard for safety, under the direction of the police, in the chase or apprehension of violators of the law or of persons charged with or suspected of any violation, nor to fire department or fire patrol vehicles when traveling in response to a fire alarm, nor to ambulances when traveling in emergencies. This exemption shall not, however, protect the operator of any such vehicle from the consequences of a reckless disregard of the safety of others.

(e) Local authorities may provide for turns or movements straight ahead on special green arrow signals. Where a left turn is provided for in the above manner, there shall be no left turns on green as above provided, when so indicated by official signs.

(f) FLASHING YELLOW OR CAUTION SIGNALS.—A signal when illuminated by rapid intermittent yellow flashes shall indicate "Caution". No signal shall be so operated as to show a constant yellow light when not in operation as a traffic signal.

Appendix H—Pennsylvania Statute § 1028.

(g) FLASHING RED SIGNAL.—In cities, boroughs, incorporated towns, or townships, a signal when illuminated by rapid intermittent red flashes shall require the operators of all vehicles and streetcars and trackless trolleys to observe the same regulations as for "STOP" signs.

PENALTY.—Any person violating any of the provisions of subsection (a) of this section, shall, upon summary conviction before a magistrate, be sentenced to pay a fine of five dollars ($5.00) and costs of prosecution and, in default of payment thereof, shall undergo imprisonment for not more than three (3) days.

1959, April 29, P. L. 58, § 1028; 1959, Aug. 4, P.L. 598, § 1.

APPENDIX I

Pennsylvania Statute

§ 619.1 Point System for Driver Education, Testing and Suspension

(a) In addition to the powers and duties of revocation and suspension conferred upon the secretary under sections 616, 617, 618 and 619 of this act,[1] he shall administer a system for driver education, testing and suspension as hereinafter provided.

(b) The secretary shall maintain a record of convictions of every person licensed under the provisions of section 601 of this act,[2] and shall enter therein records of all convictions of such persons for any violation of the motor vehicle laws of this Commonwealth and shall assign to the record of such person as of the date of conviction of the offense, a number of points for each such conviction in accordance with the following schedule of convictions and points. The point system shall apply to the following violations:

Section of Code		Number of Points
1001 (1)	Reckless driving	5
1002 (a)	Driving too fast for conditions	5
1002 (b) (1)	Exceeding speed limit of 10 miles per hour in passing any interurban or streetcar taking on or discharging passengers, or at intersection where safety zone has been established, or where traffic is controlled by a peace officer or a traffic signal	4
1002 (b) (1.1)	Exceeding 15 or 20 miles per hour limit in residence district	4
1002 (b) (2)	Exceeding speed limit of 15 miles per hour in school zone	5
1002 (b) (3)	Exceeding speed limit 20 miles per hour within 200 feet of railway grade crossing	3

Appendix I—Pennsylvania Statute § 619.1.

Section of Code		Number of Points
1002 (b), (4), (5), (6), (7), (9), 1002 (c)	Speed Over Legal Limit	
	6 to 10	3
	11 to 15	6
	16 to 20	6 (and 15 days suspension)
	21 to 29	6 (and 30 days suspension)
	30 and over	6 (and 60 days suspension)
1004	Driving to left center of highway	3
1005	Passing at intersection or railroad crossing	3
1006	Failure to drive on right half of highway	3
1007	Improper overtaking	3
1008 (a), (c), (d), (e)	Improper passing	3
1008 (b)	Improper passing on curve or crest of hill	6
1009 (a)	Failure to yield to overtaking vehicle	3
1010 (a)	Following too closely	5
1010 (b)	Following too closely (Commercial vehicles)	5
1011 (a), (b), (d)	Improper turning	3
1012	Failure to give proper signals	3
1013 (a), (b), (c)	Right of way (two vehicles at intersections at same time)	3
1014 (a), (b), (c)	Exceptions to right of way	3
1016 (a), (b)	Driving through stop sign	5
1016.1	Failure to yield right of way	5
1018 (a), (b), (c), (d), (e)	Passing school bus—loading or unloading	6
1020 (a)	Stopping on highway	3
1026	Coasting (passenger or commercial vehicle)	3
1028 (a)	Driving through traffic light	5
1036	Moving violations on Pennsylvania Turnpike other than speed	3
1113.1	Restricted zones for certain Commercial Vehicles	4

(c) In case of conviction of any person for two (2) or more of the offenses enumerated in subsection (b) of this section committed on a single occasion, points may be assessed against such person only for the offense highest in points.

(d) In the case of a conviction in another state, the secretary may assign points when such conviction, if committed in Pennsylvania, would result in assignment of points to such person's record.

(e) When any person's record shows as many as three (3) points, the secretary shall send to such person at his last known address a letter of notice pointing out such fact and emphasizing the nature and effects of the point system. Failure of any person to receive such a letter of notice shall not prevent suspension of his operator's license or learner's permit pursuant to this section. In the case of an operator who is a minor, the secretary may send a similar letter of notice to the minor's parent or guardian for his information.

(f) When any person's record for the first time shows as many as six (6) points, the secretary shall require such person to undergo a special examination as provided for in section 608(g) of this act,[3] or require such person to attend an approved driver improvement school, or require such person to attend a clinic, or any combination of the foregoing and shall so notify the person in writing. When a driver has successfully attended and passed the course at a driver improvement school, his record shall be credited with one (1) point for such attendance. If any person fails to attend and satisfactorily complete the requirements of such examination, school or clinic, an additional five (5) points shall be assigned to his record, and his operator's

license or learner's permit shall be suspended as provided in subsection (k) of this section.

(g) When any person's record has been reduced below six (6) points and for the second time shows as many as six (6) points, the secretary shall require a special examination as provided in section 608(g) of this act, and may again require such person to attend an approved driver improvement school and/or clinic and shall so notify such person in writing. If such person fails to attend and satisfactorily complete the requirements of the examination, or the approved driver improvement school or clinic an additional five (5) points shall be assigned to his record and his operator's license or learner's permit shall be suspended as provided in subsection (k) of this section.

(h) When any person's record has been reduced below six (6) points and for the third or any additional time shows as many as six (6) points, the secretary or his representative shall require such person to attend an interview wherein the record of such person shall be reviewed, and the secretary shall take such action as he shall deem proper.

(i) When any person's record shows an accumulation of eleven (11) points or more, the secretary shall suspend such person's operator's license or learner's permit.

(j) Except as provided in subsection (m) of this section, points recorded against any person shall be removed from the date of last conviction at the rate of two (2) for each year in which such person is not convicted of any violation of the laws of the Commonwealth relating to vehicles or tractors.

Appendix I—Pennsylvania Statute § 619.1.

(k) Whenever an operator's license or learner's permit is suspended pursuant to the provisions of this section, unless otherwise provided, the first such suspension shall be for a period of sixty (60) days; the second such suspension shall be for a period of ninety (90) days, and any subsequent suspension shall be for such period of time as the secretary may, in his discretion deem proper, such period to be not less than one hundred twenty (120) days nor more than one (1) year.

(l) Upon the suspension of the operator's license or learner's permit of any person as authorized by this section, the secretary shall immediately notify such person, in writing, to surrender his operator's license or learner's permit to the secretary or his authorized representative for the term of the suspension.

(m) Upon the restoration of driving privileges of any person whose operator's license or learner's permit has been suspended pursuant to this act, such person's record shall show five (5) points and from the date of restoration such points shall be removed from his record at the rate of two (2) each year, as provided in subsection (j).

(n) The secretary may, after a hearing before him or his representative, when it is indicated that such person is at fault or partly at fault in causing an accident, require such person to undergo a special examination or attend an approved driver improvement school or clinic as provided in subsection (f) of this section.

1959, April 29, P. L. 58, § 619.1, added 1966, Jan. 24, P. L. (1965) 1497, § 2. Pa. Point System, 75 P. S. 619.1.

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[1] Sections 616 to 619 of this title.
[2] Section 601 of this title.
[3] Section 608 of this title.

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In the Supreme Court of the United States

October Term, 1973
No. 73-286

JOHN REESE,
Petitioner

vs.

JACOB G. KASSAB, Secretary of the Department of Transportation of Pennsylvania, and JULIUS A. TROMBETTA, Director of the Bureau of Traffic Safety of Pennsylvania,
Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

	PAGE
Counter-Statement re Jurisdiction	1
Counter-Statement of Questions Presented	2
Counter-Statement of the Case	3
Reasons for Not Granting the Writ:	
1. The District Court did not err in not relieving Appellant from being required to submit to an administrative hearing prior to suspension under the Pennsylvania Point System Statute on the basis of his existing driver's record	5
(a) The District Court did not decide an important state question in conflict with applicable State Law	5
2. The Courts below did not err in denying Appellant's motions and in not relieving Appellant from having to submit to the administrative hearing held on April 12, 1972	6
(a) The Courts below did not overlook nor misapply binding decisions of this Court concerning the type of hearing to be given Licensee before suspension of his license	6
3. Under the circumstances of the case, the Court of Appeals did not err in denying Appellant's Rule 62(b) Motion and Rule 60(b) motion and in ruling the matter was moot because an administrative hearing had been given the Appellant	10
Conclusion	11

TABLE OF AUTHORITIES

CASES:

Bell v. Burson, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971) 3, 6, 9

Commonwealth v. Halteman, 192 Pa. Superior Ct. 379, 162 A. 2d 251 (1960) 9

Preston Motor Vehicle Operator License Case, 216 Pa. Superior Ct. 415 (1970) 9

Reese Motor Vehicle Operator License Case, 218 Pa. Superior Ct. 746, 272 A. 2d 516 (1970) 5

Reese v. Kassab et al., 334 F. Supp. 744, 747 (1971) (D.C., W.D. Pa.) 6

Virnelson Motor Vehicle Operator License Case, 212 Pa. Superior Ct. 359, 368, 243 A. 2d 464 (1968) 7

REFERENCES TO APPELLANT'S APPENDICES:

Appendix A, page 2a 4
Appendix D, page 6a 6
Appendix D, page 12a 3
Appendix D, pages 14a-15a 3

Joint Appendix, Vol. II, Court of Appeals, p. 214 9

STATUTES:

Pennsylvania Point System Law:

Act of April 29, 1959 (P.L. 58), as amended Section 619.1 ; 75 P.S. §619.1 .. 7, 8

28 U.S.C. §1254(1) 1
28 U.S.C. §1254(3) 1

RULES:

Federal Rules of Civil Procedure:

Rule 60(b) 2, 3, 10
Rule 62(b) 2, 3, 10

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-286

JOHN REESE,

Petitioner

JACOB G. KASSAB et al.,

Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

COUNTER-STATEMENT RE JURISDICTION

Petitioner alleges that the jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (3) whereas jurisdiction is actually invoked under 28 U.S.C. §1254(1) and not §1254(3).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. The District Court did not err in not relieving Appellant from being required to submit to an administrative hearing prior to suspension under the Pennsylvania Point System Statute on the basis of his existing driver's record.

2. The District Court did not err in denying Appellant's motions under Rules 62(b) and 60(b) of the Federal Rules of Civil Procedure and in not relieving Appellant from having to submit to an administrative hearing.

3. The Court of Appeals did not err in dismissing Appellant's appeal on the basis that Appellant's Rule 62 (b) motion was not a final order and therefore not appealable and that the denial of the Rule 60(b) motion by a single judge of the District Court was not reviewable by it and in ruling the matter was moot, because an administrative hearing had been afforded and given to Appellant.

COUNTER-STATEMENT OF THE CASE

The Appellant, John Reese, after exhausting his State remedies in the Pennsylvania Courts, i.e., the Court of Common Pleas of Washington County, the Superior Court and the Supreme Court of Pennsylvania, filed a complaint in the District Court for the Western District of Pennsylvania, attacking the constitutionality of the Pennsylvania Point System Law on the basis that no pre-suspension hearing was afforded him as required by this Honorable Court in the *Bell v. Burson* decision, 402 U.S. 535, 91 U. S. Supreme Court 1586, 29 L. Ed. 2d 90 (1971).

The said District Court did not declare the Pennsylvania Point System Law per se unconstitutional but held that before an operator's license can be suspended by the secretary under the terms of the Pennsylvania Point System, there must be notice and opportunity for a hearing before the action becomes effective (Appellant's App. D., p. 12a). The Court issued an order dated October 26, 1961 (Appellant's App. D., pp. 14a-15a) in favor of the Appellant and against the Respondents herein *permanently* enjoining them from suspending Appellant's operator's license, *unless* after an administrative hearing is granted in accordance with the opinion of this Court, it be shown that there is sufficient reason for said suspension.

In full compliance with the District Court's order and opinion, the Respondents notified the Appellant of the administrative hearing prior to suspension, whereupon the Appellant filed his motions under Rule 60(b) and 62(b) which were denied by the Honorable Louis Rosenberg,

alone, on April 11, 1972. The Appellant then filed his appeal to the Court of Appeals for the Third Circuit from said denial of his motions and on May 16, 1973, based on the briefs submitted by the parties and without oral argument, Appellant's appeal was dismissed (Appellant's App. A, p. 2a). Whereupon Appellant filed his petition for writ of certiorari to this Honorable Court.

REASONS FOR *NOT* GRANTING THE WRIT

1. The District Court did not err in not relieving Appellant from being required to submit to an administrative hearing prior to suspension under the Pennsylvania Point System Statute on the basis of his existing driver's record.

(a) The District Court did not decide an important State question in conflict with applicable State law.

(i) The action of the Secretary of Transportation and Director of the Bureau of Traffic Safety, respondents herein, were reviewed on appeal by the Court of Common Pleas of Washington County, Pennsylvania, on at least two separate occasions and then by the Superior Court of Pennsylvania and in all instances the regularity and propriety of such actions by Respondents were affirmed by said courts; see *Reese Motor Vehicle Operator License Case,* 218 Pa. Superior Ct. 746, 272 A. 2d 516 (1970). The Supreme Court of Pennsylvania denied Appellant's petition for Allocatur.

The only issue in Appellant's appeal to the District Court for the Western District of Pennsylvania concerned the constitutionality of the Pennsylvania Point System Law. The said District Court did not declare the Pennsylvania Point System Law per se unconstitutional but merely held that before an operator's license could be suspended by the Commonwealth the licensee must be first afforded notice and opportunity for an administrative hearing prior to the suspension becoming effective. See

Reese v. Kassab et al., 334 F. Supp. 744 at 747 (1971) (Appellant's App. D, p. 6a).

To date, the Appellant has not served one day of the sixty (60) day suspension mandated by the Pennsylvania Point System Law.

Accordingly, the Respondents aver and maintain that Appellant's allegations and arguments hereunder are clearly improper, are without merit and are not germane to the issues presented in these proceedings to this Honorable Court.

---

2. The Courts below did not err in denying Appellant's motions and in not relieving Appellant from having to submit to the administrative hearing held on April 12, 1972.

(a) The Courts below did not overlook nor misapply binding decisions of this Court concerning the type of hearing to be given licensee before suspension of his license.

(i) and (ii) In *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971), the Court said at page 96 (29 L. Ed. 2d 96): "The hearing required by the Due Process Clause must be 'meaningful', Armstrong v. Manzo, 380 U.S. 545, 552 (1965) and 'appropriate to the nature of the case.' *Mullane v. Central Hanover Bank & Trust Co.* (supra). It is a proposition which hardly seems to need explication *that a hearing which excludes consideration of an element essential to the decision* whether the licenses of the nature here involved shall be suspended does not meet this standard." (Emphasis supplied.) The Court further said at page 96 "while 'many contro-

versies have raged about . . . the Due Process Clause,' *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, at 313, it is fundamental that except in emergency cases (and this is not one) *due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' before the termination becomes effective.*"

The records of the State Courts and that of the District Court for the Western District of Pennsylvania clearly show that Appellant was afforded the due process to which he is and was entitled.

In the *Virnelson* case, 212 Pa. Superior Ct. 359, 243 A. 2d 464 (1968), the Superior Court stated that ". . . [a]t the hearing before the lower court the Commonwealth should produce the records of convictions received . . . from the magistrates and courts of record in the proper form and the secretary's record compiled therefrom which justified the suspension. If these documents showed that the suspension was given in accordance with the mandate of Section 619.1 [of the Vehicle Code, Point system law], the Commonwealth had produced a prima facie case for suspension. . . ." The Court further stated on page 368 of said opinion: "If the defendant wishes he may then proceed to show he was not convicted or that the records or computations of the secretary are incorrect." The Courts of Pennsylvania clearly found that the decision of the *Virnelson* case, supra, had been complied with by the Respondents herein and dismissed the appeal of the Appellant.

Appellant then alleges in Reason No. 2 for Granting Writ that "The Statutory Court has *permanently* enjoined

Appellees (Respondents herein) from suspending Appellant's driver's license under the Pennsylvania Point System statute *'unless* after an administrative hearing is granted in accordance with the opinion of this Court, it be shown that there is sufficient reason for said suspension.' "

Based on said holding by the District Court below, Respondents afforded the Appellant notice and opportunity for an administrative hearing; the hearing was held and was attended by Appellant, his counsel and their stenographer. Since by Appellant's own admissions in the State Courts and in the District Court below that he had paid the fine and costs on all the offenses charged and that he had not appealed any of these convictions as provided by law and consequently the action of the Respondents thereon were held proper by the said State Courts, the administrative hearing granted Appellant of necessity showed that there was sufficient reason for said suspension to be imposed. A notice of suspension was therefore properly sent to the Appellant advising him that his operating privileges would be suspended for sixty (60) days, effective July 10, 1973, as mandated by the Point System Law. On Appellant's petition for a writ of certiorari to this Honorable Court, the aforesaid suspension was rescinded pending this Court's action on this petition.

(iii) The Appellant alleges that a distinction should not be made between pre-suspension hearings in financial responsibility cases and in hearings before suspension of licenses under the Pennsylvania Point System Law (75 P.S. 619.1) i.e. that both type hearings should be adversary hearings.

The Respondents aver that such procedure would be contrary to law in that an adversary hearing is a necessity

in a financial responsibility case in that there must be a determination of fault and the review of such cases on appeal is de novo whereas the point system law has mandatory provisions under which the secretary does not exercise any discretion since his actions are based on convictions and on review the licensee may only show that he was not convicted and not that he should not have been convicted and that the computation of the points was not proper. He cannot collaterally attack the criminal convictions in a suspension appeal since suspension appeals are civil in nature and not criminal. See *Commonwealth v. Halteman,* 192 Pa. Superior Ct. 379, 162 A. 2d 251 (1960); *Preston Motor Vehicle Operator License Case,* 216 Pa. Superior Ct. 415 (1970). As this Honorable Court stated in *Bell v. Burson,* supra, the (administrative) hearing must be *appropriate* to the nature of the case. The Appellant offered no evidence or testimony whatever at the departmental hearing held on April 12, 1972 that (1) he was not the person convicted of the three offenses charged nor (2) that the points as to said convictions were improperly assigned or erroneously computed.

The Respondents further aver and contend that Appellant's arguments throughout his petition wherein it is alleged that the court below declared Appellant's second conviction of violating Section 1028(a) of the Vehicle Code invalid is without merit and this contention is supported by Judge Rosenberg's statements contained in page 214 of the Joint Appendix Vol. II wherein the Court below said: *"We did not rule on any merits nor any factual situations.* All we ruled upon was merely an admission by the Commonwealth of Pennsylvania that there had been no hearing provided and that the suspension had occurred

previous—prior to the actual hearing, which ordinarily, or customarily, was permitted, and we agreed that the hearing should be granted before the suspension. *That is all we ruled."* (Emphasis ours.)

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3. Under the circumstances of the case, the Court of Appeals did not err in denying Appellant's Rule 62(b) motion and Rule 60(b) motion and in ruling the matter was moot because an administrative hearing had been given the Appellant.

Respondents aver and contend that the Court of Appeals properly denied Appellant's motions under Rules 60(b) and 62(b) of the Federal Rules of Civil Procedure in that had the said Court granted same it would have created a situation which would have been in direct opposition to Appellant's reasons for originally taking an appeal to the District Court, i.e. to afford Appellant his constitutional right of notice and opportunity to an administrative hearing prior to the suspension of license becoming actually in effect. Accordingly, the Appellant has not presented a substantial federal question to this Court since the federal question at issue before the District Court is now moot as the Respondents have afforded Appellant proper notice and opportunity for an administrative hearing and an administrative hearing prior to suspension has been held.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should not be granted under the circumstances of this case.

Respectfully submitted,

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